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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G & R ROOFING COMPANY,

Cross-Petitioner,

v.

CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Michael E. Merrill
Mark T. Bennett
MERRILL AND SCHULTZ,
A LAW CORPORATION
4420 Hotel Circle Court
Suite 345
San Diego, California 92108
(619) 293-3722

Counsel for Cross-Petitioner G & R Roofing Company

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

QUESTIONS PRESENTED

1. Whether the Multiemployer Pension Plan Amendments Act of 1980 violates the fifth amendment's guarantee that property will not be taken for a public purpose without just compensation?

2. Whether an employer who is required to make withdrawal liability payments to a multiemployer pension plan under the compulsion of the Multiemployer Pension Plan Amendments Act of 1980 prior to receiving a meaningful hearing before a judicial officer with the discretion to deny the claim is deprived of due process under the fifth amendment?

3. Whether the Multiemployer Pension Plan Amendments Act of 1980 violates the fifth amendment's guarantee of a right to a hearing before an impartial and detached tribunal in the first instance when the initial review of withdrawal liability assessments is submitted to the trustees of the multiemployer pension plan who computed the liability and who have a direct pecuniary interest in the outcome of any dispute?

4. Whether the Multiemployer Pension Plan Amendments Act of 1980 violates the due process clause of the fifth amendment by prescribing that legal and factual conclusions reached by the trustees of a multiemployer pension plan in reviewing their own assessment of withdrawal liability are presumed to be correct unless shown to be unreasonable and/or clearly erroneous?

5. Whether the Multiemployer Pension Plan Amendments Act of 1980, which requires that factual questions concerning the accuracy of the assessment of withdrawal liability be determined in compelled arbitration without the benefit of a trial by jury, violates the seventh amendment?

6. Whether the Multiemployer Pension Plan Amendments Act of 1980 which requires that certain disputes over the assessment of withdrawal liability be submitted to compelled arbitration with limited review by the courts deprives a withdrawn employer of access to an Article III court?

LIST OF PARTIES TO THE PROCEEDINGS

Carpenters Pension Trust for Southern California

Shelter Framing Corporation

G & R Roofing Company

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G & R ROOFING COMPANY,

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CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cross-Petitioner G & R Roofing Co. ("G & R") respectfully prays that in the event this Court grants the petition for writ of certiorari of Carpenters Pension Trust for Southern California ("CPT") in the above-captioned matter that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 20, 1983, regarding the questions presented by this cross-petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 705 F.2d 1502 (9th Cir. 1983) (App. Cert. at 1-27).[1] The order (App. Cert. at 28) and amended order (App. Opp. at 1a) denying CPT's petition for rehearing and suggestion for rehearing *en banc*, respectively filed on September 13 and October 4, 1983, are neither officially nor unofficially reported. The order denying the petition for rehearing and suggestion for rehearing *en banc* of PBGC with regard to its appeal from the denial of its motion to intervene in the district court (App. Opp. at 2a-3a) is neither officially nor unofficially reported.

The opinion of the district court (App. Cert. at 29-70) granting G & R's motion for summary judgment is reported at 543 F.Supp. 1234 (C.D. Cal. 1982). The district court's summary judgment (App. Opp. at 4a-8a) is unofficially reported at 3 E.B.C. (BNA) 1281 (C.D. Cal. April 13, 1982).

JURISDICTION

This is a cross-petition filed pursuant to Sup.Ct.R. 19.5. CPT's petition for writ of certiorari was filed with this court on or about September 26, 1983, and sets forth the grounds upon which jurisdiction in this Court is invoked. (Petition at 2) CPT's petition was received by G & R's counsel on September 26, 1983. This cross-petition is being filed not more than thirty days thereafter.

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[1] "App. Cert." refers to portions of the appendices to the petition for writ of certiorari. "App. Opp." refers to portions of the appendices to G & R's brief in opposition to CPT's Petition for Writ of Certiorari. "Petition" refers to CPT's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. "Opp." refers to G & R's Brief in Opposition to Petition for Writ of Certiorari. "MPPAA" refers to the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208 (1980), 29 U.S.C. §§ 1381, *et seq.* (Supp. V 1981). "ERISA" refers to the Employee Retirement Income Security Act of 1974, 88 Stat. 829 (1974), 29 U.S.C. §§ 1001, *et seq.* (1976). "MPPAA §" refers to sections of ERISA as amended by MPPAA.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent statutory and constitutional provisions are set forth in CPT's petition (Petition at 2, App. Cert. at 71-84), and G & R's brief in opposition to the petition (Opp. at 2-3). As pertains to this cross-petition, the additional pertinent constitutional provision is U.S. Const. amend. VII. The seventh amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The nature of this case, the progress of the proceedings before the district court and the Ninth Circuit, and the material facts underlying G & R's constitutional challenges to the imposition of withdrawal liability on retroactivity and taking without just compensation grounds are set forth in the opposition to the petition for writ of certiorari. (Opp. at 3-9) The operation of MPPAA as it pertains to G & R's procedural due process and seventh amendment challenges is summarized below.

MPPAA mandates that the "plan sponsor" assess and collect withdrawal liability. MPPAA § 4219(b)(1), 29 U.S.C. § 1399(b)(1) (Supp. V 1981). The term "plan sponsor" refers to the joint board of trustees of CPT. MPPAA § 4001(a)(10)(A), 29 U.S.C. § 1301(a)(10)(A) (Supp. V 1981).

For employers primarily engaged in the building and construction industry, like G & R, who were signed to a collective bargaining agreement requiring the payment of contributions to a plan which primarily covers employees engaged in the building and construction industry, such as CPT, a complete withdrawal occurs when the employer: (1) ceases to have an obligation to contribute to CPT in the area covered by the collective bargaining agreement, and (2) continues to do work of the type and in the area formerly covered by the collective bargaining agreement. MPPAA § 4203(b), 29 U.S.C. § 1383 (b) (Supp. V 1981).

The amount of withdrawal liability assessed is the employer's proportionate share of CPT's unfunded vested benefits as computed under MPPAA § 4211(b), 29 U.S.C. § 1391(b) (Supp. V 1981). The amount of unfunded vested benefits is the difference between the value of the nonforfeitable benefits under the plan and the value of the assets of the plan. *See* MPPAA § 4213(c), 29 U.S.C. § 1393(c) (Supp. V 1981). Computing the unfunded vested benefits under any pension plan is largely dependent upon the actuarial assumptions adopted by the pension plan. *See* MPPAA § 4213(a), 29 U.S.C. § 1393(a) (Supp. V 1981).

Once the amount of an employer's withdrawal liability has been computed and CPT has made a demand for payment of that amount, the trust fund's claim is self-executing. CPT need do nothing more to prove entitlement to the amount of withdrawal liability assessed. The entire burden is placed upon G & R to obtain information to evaluate the amount of withdrawal liability assessed, to request review from CPT, and to initiate arbitration proceedings in the event that G & R is not satisfied with the outcome of the review by CPT. *See* MPPAA § 4221(a) and (e), 29 U.S.C. § 1401(a) and (e) (Supp. V 1981), and MPPAA § 4219(b)(2)(A), 29 U.S.C. § 1399(b)(2)(A) (Supp. V 1981).[2]

In any arbitration proceeding, CPT's determinations with regard to any issue arising under MPPAA § 4201, 29 U.S.C. § 1381 (Supp. V 1981), through MPPAA § 4219, 29 U.S.C. § 1399 (Supp. V 1981), and MPPAA § 4225, 29 U.S.C. § 1405 (Supp. V 1981), are presumed to be correct unless found to be unreasonable or clearly erroneous by a clear preponderance of the evidence. MPPAA § 4221(a)(3)(A), 29 U.S.C. § 1401(a)(3)(A) (Supp. V 1981). For example, CPT's determinations as to whether there has been a complete or partial withdrawal [MPPAA §§ 4203 and 4205, 29 U.S.C. §§ 1383 and 1385 (Supp. V 1981)], whether any of the statutory limitations on the amount of withdrawal liability collectable apply [*see, e.g.*, MPPAA §§ 4207, 4208, and 4225, 29 U.S.C. §§ 1387, 1388, and 1405 (Supp. V 1981)]; whether there is or has ever been an obligation to contribute to CPT [MPPAA § 4212, 29 U.S.C. § 1392

[2] While Section 4221(a) of MPPAA allows either party to initiate the arbitration, a practical construction of the statute reveals that CPT will never have an incentive to initiate arbitration where the amount of withdrawal liability is at issue. Section 4221(b)(1), 29 U.S.C. § 1401(b)(1) (Supp. V 1981), provides that if arbitration is not initiated by G & R, G & R must pay the amount of withdrawal liability assessed. CPT can simply wait for G & R to initiate arbitration within the time limits prescribed by the statute. If G & R does not initiate arbitration, CPT is entitled to the entire amount demanded even though the amount is contested.

(Supp. V 1981)], or whether any transaction has a principal purpose of attempting to evade withdrawal liability [MPPAA § 4212(c), 29 U.S.C. § 1392(c) (Supp. V 1981)] are presumed to be correct.

With regard to the computation of the plan's unfunded vested benefits, actuarial assumptions employed by CPT are presumed to be correct unless it is shown by a clear preponderance of the evidence that the actuarial assumptions and methods used were, *in the aggregate*, unreasonable. MPPAA § 4221(a)(3)(B)(i), 29 U.S.C. § 1401(a)(3)(B)(i) (Supp. V 1981).

Once the assessment and demand for withdrawal liability payments is received, G & R must commence making withdrawal liability payments within sixty days of receipt of the demand notice. G & R must either pay the amount in one lump sum, or convert the amount owing to monthly or quarterly payments. MPPAA § 4219(c)(2) and (3), 29 U.S.C. § 1399(c)(2) and (3) (Supp. V 1981). It is mandatory under MPPAA that the payments commence even though G & R disputes any claim that it has withdrawal liability, or that G & R disputes the claimed amount of withdrawal liability, and regardless of whether G & R has requested arbitration. MPPAA §§ 4219(c)(2) and 4221(d), 29 U.S.C. §§ 1399(c)(2) and 1401(d) (Supp. V 1981).

The requirement that payments be made even though the existence or amount of withdrawal liability assessed is disputed applies to all withdrawn employers. That particular statutory provision is not limited to situations in which CPT can demonstrate that, if immediate payments do not commence, its ability to collect withdrawal liability will be impaired. *See* MPPAA § 4219(c)(2), 29 U.S.C. § 1399(c)(2) (Supp. V 1981).

The size of the monthly payment is computed based upon G & R's contribution history over the ten year period prior to the date of withdrawal. The average annual number of contribution base units, in this case the number of hours reported to CPT, for the highest three years is multiplied by the highest rate for contributions during that same ten year period. There is no statutory adjustment for employers whose current financial circumstances make it impossible or difficult to meet the schedule of payments, or where the number of hours reported annually or the rate for contributions is not reflective of the scale of the company's operation in recent years.

If the withdrawn employer fails to make the payments set forth in the schedule provided, CPT may notify the withdrawn employer of the delinquency. If the delinquency is not cured within sixty days, CPT at its discretion may accelerate its claim and declare the entire amount of withdrawal liability due and payable. MPPAA § 4219(c)(5), 29 U.S.C. § 1399(c)(5) (Supp. V 1981). Because payments of withdrawal liability pending review or appeal are mandated by MPPAA § 4219(c)(2), 29 U.S.C. § 1399(c)(2) Supp. V 1981), the acceleration can occur even though review or arbitration of the withdrawal liability assessed has been requested. *See also* MPPAA § 4221(d), 29 U.S.C. § 1401 (Supp. V 1981).

The failure of G & R to make withdrawal liability payments is considered to be a delinquency which gives rise to a civil collection action. MPPAA § 4301(b), 29 U.S.C. § 1451(b) (Supp. V 1981). In any such action by CPT to recover delinquent withdrawal liability payments, CPT *must* be awarded the unpaid contributions, interest, liquidated damages in an amount not to exceed twenty percent of the amount recovered, reasonable attorney's fees, and costs. *See* MPPAA § 502(g)(2), 29 U.S.C. § 1132(g)(2) (Supp. V 1981). MPPAA does not require that CPT post a bond or any other form of security to protect G & R from damages sustained in the event that CPT has inaccurately computed the amount of withdrawal liability or wrongfully demanded withdrawal liability payments. MPPAA does not prescribe any time period within which suit must be brought to collect delinquent withdrawal liability payments, other than the limitations period.

If the amount of withdrawal liability assessed is questioned, G & R must request a review by CPT within ninety days subsequent to the receipt of the demand for payment. MPPAA § 4219 (b)(2), 29 U.S.C. § 1399(b)(2) (Supp. V 1981). G & R is not entitled to a hearing before an arbitrator until either CPT makes a decision on the request for review or until 120 days has expired from the date of the demand for review. MPPAA § 4221(a)(1), 29 U.S.C. § 1401(a)(1) (Supp. V 1981). The statute does not prescribe any time period within which the arbitration must take place, nor doe sit specify when a decision must be rendered. The payment of withdrawal liability, however, must continue.

REASONS FOR GRANTING THE CROSS-PETITION

A. Review Of The Questions Presented In The Cross-Petition Is Proper.

Although the Ninth Circuit decision does not address any of the questions presented in this cross-petition, *Shelter Framing Corp.*, 705 F.2d at 1515 (App. Cert. at 27), it is proper for this Court to reach these issues if the Court upholds the constitutionality of MPPAA as applied to employers who withdrew between the statute's enactment date of September 26, 1980 and its retroactive effective date of April 29, 1980. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n. 24 (1979).

The material facts involved are uncontroverted. Each of the issues raised by this cross-petition was fully briefed in the district court and the Ninth Circuit. The district court addressed all of the questions presented except the issue as to whether MPPAA constitutes a taking of private property for a public purpose without just compensation. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 543 F.Supp. 1234, 1243-48, 1254 (C.D. Cal. 1982), *aff'd on other grounds*, 705 F.2d 1502 (9th Cir. 1983) (App. Cert. at 45-56, 69). With regard to that question, the district court found "some serious questions raised against the statute on this ground." *Id.* at 1254 (App. Cert. at 69).

With regard to the procedural due process and seventh amendment challenges to MPPAA, the district court's decision conflicts directly and irreconcilably with the prior decisions of this Court discussed below.

B. Reviewing The Issues Presented In The Cross-Petition Will Resolve The Question As To The Constitutionality Of MPPAA As Applied Prospectively And Procedurally, Thereby Relieving Employers, Multiemployer Pension Plans, And Courts Of The Burden Of The Numerous Constitutional Challenges To MPPAA.

This Court has noted probable jurisdiction in *R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F.Supp. 531 (D. Ore. 1982), *rev'd sub nom. Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, 705 F.2d 1502 (9th

Cir. 1983), *prob. juris. noted sub nom. Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, ___ U.S. ___ (Oct. 17, 1983) (Nos. 83-245 and 83-291). The *Gray* appeal pertains to only one of three cases consolidated for disposition by the Ninth Circuit in *Shelter Framing Corp.*, 705 F.2d at 1505 n. 3 (App. Cert. at 4). The two other cases are this case and *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, which were consolidated in the district court proceedings. Of these three cases, only this case has preserved the comprehensive attack against MPPAA. Granting this cross-petition will give the Court an opportunity to consider and rule on virtually all avenues of attack against MPPAA's constitutionality.

MPPAA was passed on September 26, 1980. Its passage has spawned over 100 litigations nationwide challenging its constitutionality on one or more of the grounds raised by this cross-petition. Of the pending cases, a handful of courts has rendered decisions upholding the constitutionality of MPPAA in its prospective and procedural application. *E.g., Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, ___ F.2d ___, Nos. 83-1054, 83-1109, 83-1119, 83-1196 (4th Cir. Sept. 9, 1983); *Peick v. Pension Benefit Guaranty Corporation*, 539 F.Supp. 1025 (N.D. Ill. 1982), *appeal pending*, No. 82-2081 (7th Cir. filed July 7, 1982); *Western Conference of Teamsters Pension Trust Fund v. J.N. Ceazan*, 4 E.B.C. (BNA) 1575 (N.D. Cal. March 17, 1983); *R.A. Gray & Co. v. Oregon-Washington Carpenters-Employers Pension Trust Fund*, 549 F.Supp. at 538-40; *Washington Star Co. v. International Typographical Union and Negotiated Pension Plan*, 4 E.B.C. (BNA) 1145 (D. D.C. Feb. 9, 1983), *appeal pending*, No. 83-1313 (D.C. Cir. filed Mar. 14, 1983); *Manufacturing Industry Retirement Fund v. Lazar-Wisotzky, Inc.*, 3 E.B.C. (BNA) 1977 (S.D. N.Y. Aug. 23, 1982); *Victor Construction Co. v. Construction Laborers Pension Trust*, 3 E.B.C. (BNA) 1763 (C.D. Cal. June 25, 1982), *appeal pending*, No. 82-5701 (9th Cir. filed July 23, 1982). A number of these cases are pending on appeal.

If the cross-petition is denied and the Court finds that the statute's retroactive application is constitutional, G & R may lose its opportunity for judicial review in this Court on the taking without just compensation, jury trial, and procedural due process issues.

At stake in the MPPAA constitutional challenges is over $64,000,000 in withdrawal liability assessments. *See* Jurisdictional Statement of PBGC at 11 in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, ___ U.S. ___, Nos. 83-245 and 83-291 (prob. juris. noted Oct. 17,

1983). The amounts actually assessed, however, do not accurately represent the true larger amount of withdrawal liability claims. Many multiemployer pension plans have delayed billing withdrawn employers for withdrawal liability in order to avoid the costs of constitutional litigation which have followed actual assessments.

Reviewing the questions presented in this cross-petition will have a salubrious effect upon the federal judicial system and multiemployer pension plans. A ruling from this Court as to MPPAA's constitutionality on taking, seventh amendment, and procedural due process grounds will quell the surging tide of constitutional litigation which threatens to inundate the federal courts. If MPPAA is upheld, multiemployer pension plans will be free to assess and collect withdrawal liability obligations. The assets of these pension plans will no longer be consumed in defending MPPAA from constitutional attacks.

Employers who have withdrawn from those plans will also benefit from an early, comprehensive ruling from this Court. The claims asserted against withdrawn employers are often in disabling amounts, threatening the economic survival of the companies involved. *See, e.g., Shelter Framing Corp.*, 705 F.2d at 1506 (App. Cert. at 31-32). These companies must disclose the amounts assessed as potential liabilities. This interferes with the ability to obtain credit, bonding, and to otherwise carry on normal business operations.

Employers which have remained participants in multiemployer pension plans will likewise benefit by this Court's consideration of the taking without just compensation, seventh amendment, and procedural due process challenges. For these employers, withdrawal liability is an impending and threatening obligation which interferes with the ability to sell one's business, to transfer assets, or to cease operations.

C. Each Of The Questions Raised Presents A Meritorious Challenge To The Constitutionality Of MPPAA.

1. The presumption of correctness given to CPT's determinations under MPPAA are arbitrary and a denial of due process.

This Court has recognized that "[i]n all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). The vindication of legal rights more often depends upon how the factfinder appraises the facts than on the disputed construction of a statute or the interpretation of a line of precedents. *Id.* at 520.

MPPAA imposes unwarranted presumptions in favor of CPT's determination of withdrawal liability. The presumptions of correctness are not limited to the computation of withdrawal liability and the actuarial assumptions utilized by multiemployer plans. The statutory presumptions apply to any interpretation or application of the statute under MPPAA §§ 4201-19 and 4225, 29 U.S.C. §§ 1381-99 and 1405 (Supp. V 1981).

In order to satisfy due process requirements, there must be some rational connection between the fact proved and the ultimate fact presumed. The inference of one fact from proof of another cannot be purely arbitrary. *Mobile, J. & K.C. Railroad v. Turnipseed*, 219 U.S. 35, 43 (1910); *accord Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 29 (1976). The due process guarantee is violated where the inference of one fact from proof of another is arbitrary because of the lack of an empirical connection between the two. *Tot v. U.S.*, 319 U.S. 463, 467-68 (1943). As the standard for considering the validity of a statutory presumption is one of rational connection, then certainly the greater weight given to the presumption mandates a closer connection in common experience between the fact proved and the ultimate fact presumed.

In *Usery v. Turner Elkhorn Mining Co.*, the presumptions concerned the relationship of the length of time employed in coal mines to the probability of having contracted black lung disease. In upholding these presumptions against allegations of arbitrariness, this Court emphasized the powerful medical and scientific evidence demonstrating the close statistical relationship between duration of exposure to concentrated coal

dust as found in coal mines and the incidence of contracting black lung disease. 428 U.S. at 28-30.

The effect of the presumptions upheld in *Turner Elkhorn Mining Co.*, is a pale shadow of the force of the presumption given to CPT's assessment of withdrawal liability. MPPAA's assignment of presumptions of correctness to CPT's determinations is purely arbitrary. There is no basis in common experience to find that CPT can better interpret or apply the statutory provisions than others.

The use of actuarial assumptions is necessarily dependent upon economic forecasting. The statute essentially delegates the economic forecasting function to CPT. CPT possesses no special competence for making such determinations -- and certainly CPT cannot be considered more prescient than others to entitle it to this weighty presumption. In fact, the legislative history reveals that Congress did not attach any particular faith in the trustees' ability to foretell the future. Congress merely sought to shield the trustees from "equally correct" actuarial approaches to determining unfunded vested benefits. *Senate Labor Committee Summary and Analysis of Consideration of S. 1076* (April 1980), reprinted in *BNA Pension Reporter Special Supplement*, at 85 (September 29, 1980).

2. Requiring withdrawn employers to present their challenges to the accuracy of withdrawal liability assessments to CPT deprives G & R of the right to a fair hearing before an impartial tribunal.

There is no procedural right more fundamental than the right to a hearing before an impartial and disinterested tribunal. *Winters v. Miller*, 446 F.2d 65, 71 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). This procedural due process right applies to both civil and criminal cases, and to administrative proceedings. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Gibson v. Berryhill*, 411 U.S. 564 (1973). As this Court stated in *Marshall v. Jerrico, Inc.*, "'justice must satisfy the appearance of justice,' and this 'stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. . . .'" 446 U.S. at 243 (citations omitted).

Tumey v. Ohio, 273 U.S. 510, 532 (1927), sets forth the appropriate standard for judging impartiality:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of the law.

The fact that there may be a review of the challenged tribunal's decision, even a *de novo* review, does not satisfy due process. "Petitioner is entitled to a neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1973) (footnote omitted).

In assessing whether a particular tribunal satisfies the requirement of impartiality, two factors are examined: (1) whether members of the tribunal have a pecuniary or personal interest in the outcome, and (2) whether there has been an improper merger of the adversarial and adjudicative functions.

In *Tumey*, this Court held that due process prohibited a town from granting its mayor the court costs assessed against a convicted defendant. No fees or costs were retained by the mayor if the defendant was found to be not guilty. The Court found that the due process clause of the fourteenth amendment was violated because the mayor had "a direct, personal, substantial pecuniary interest in reaching a conclusion" against the defendant in order to obtain the costs awarded. 273 U.S. at 523.

The Court has not found it essential that there be a finding of direct financial interest in the outcome of a case in order to find a lack of impartiality and disinterest. In *Gibson v. Berryhill*, procedural due process was violated by a decision of the Alabama State Board of Optometry revoking the licenses of "all optometrists in the state who were employed by business corporations. . . ." The board was composed solely of optometrists in private practice. The Court accepted the district court's conclusion that "success in the Board's efforts would *possibly* redound to the personal benefit of members of the Board. . . ." 411 U.S. at 578 (emphasis added). The Court further accepted the conclusion that "the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose." *Id.* at 579.

In *Tumey*, 273 U.S. at 532-35, this Court alternatively held that the mayor could not hear the case against the defendant because the mayor was the chief executive of the town and was charged with the business of looking after the town's finances. The fines provided by the mayor's court were a means of substantially adding to the income of the town. The Court found that the simultaneous holding of "two practically and seriously inconsistent positions, one partisan and the other judicial" interjected sufficient partiality to create a lack of due process. 273 U.S. at 534. This principle has been employed to invalidate civil and administrative proceedings. *E.g., Morrissey v. Brewer*, 408 U.S. 471, 485-87 (1972); *Ward*, 409 U.S. at 58-60; *Goldberg v. Kelly*, 397 U.S. 254, 269, 271 (1970).

MPPAA's statutory dispute resolution procedures do not comport with the rudimentary due process requirement of an initial hearing before an impartial and disinterested tribunal. Trustees of CPT conduct the mandatory review of any disputes over withdrawal liability assessments. Half of the members of CPT's Board of Trustees are appointed by the union and half of its members are appointed by the multiemployer associations. Each of the union appointed trustees is an executive, employee, or a member of the Carpenters' union or one of its affiliated district councils or local unions. Each of the employer appointed trustees is an executive or owner of a construction company which has been and is signatory to a collective bargaining agreement with the Carpenters' union requiring contributions to CPT by virtue of that company's membership in one of the multiemployer associations.

The trustees of CPT occupy inconsistent roles, one of which is partisan; the other is judicial in nature. The trustees are charged with the administration of the trust funds, including the collection of delinquent contributions and withdrawal liability payments. Withdrawal liability payments which are assessed by the trustees under MPPAA against withdrawn employers add substantially to CPT's revenues.

The trustees also sit in a judicial or quasi-judicial capacity by initially resolving disputes over withdrawal liability assessments. Having undertaken the task of computing the amount of unfunded vested benefits and the amount of withdrawal liability allocable to a withdrawn employer, it cannot be expected that the trustees will exercise neutral objectivity in reviewing challenges to the amounts claimed. CPT and its trustees have an obvious direct financial stake in maximizing the amount of withdrawal liability assessed.

These MPPAA procedures flaunt the unbroken line of Supreme Court precedents holding that an impartial and disinterested tribunal in the first instance is a fundamental due process requirement.

3. MPPAA denies G & R of its right to a hearing at a meaningful time and in a meaningful manner.

The fifth amendment guarantees that no one will be deprived of life, liberty or property without due process of law. Procedural due process requires that a deprivation of liberty or property be preceded by prior notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The Constitution places a lofty value on a "person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). *See Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (rights in property are basic civil rights). Even temporary deprivations of property are protected by the due process clause. *Fuentes*, 407 U.S. at 84-85; *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring). The procedural due process guarantees apply with equal force to commercial transactions. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1975).

The right to notice and an opportunity to be heard before suffering any type of loss is central to the meaning of due process. The purpose is to ensure "abstract fair play" and to protect an individual's right to the enjoyment and use of his property from "substantially unfair or mistaken deprivations." *Fuentes*, 407 U.S. at 80-81. To be meaningful, notice and a hearing must take place when the deprivation can still be prevented. A later hearing and a damage award cannot undo the fact "that the arbitrary taking that was subject to the right of procedural due process has already occurred."

A court is justified in postponing notice and an opportunity to be heard only in the face of extraordinary circumstances. *Fuentes*, 407 U.S. at 90. To justify a post-taking hearing, the following conditions must be met: (1) the taking must be directly necessary to secure an important governmental or general public interest, (2) there must be a special need for very prompt action, and (3) the government must exercise strict

control over its monopoly of legitimate force. *Id.* at 91. All of these requisites must be satisfied.

This Court's decision in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), illustrates the type of narrowly drawn statute allowing for a pre-hearing deprivation of property which will satisfy due process criteria. In *Mitchell*, a state sequestration statute permitted a creditor holding a vendor's lien to secure a writ of sequestration on the application of the creditor that the debtor was delinquent in making installment payments. The statute required that: (1) a judge approve the creditor's application for pre-judgment sequestration; (2) approval was permitted only when the claim and the factual and legal grounds relied upon were clearly stated and verified by the creditor; (3) the creditor had to furnish a bond in the amount specified by the judge; (4) the debtor could regain possession either by furnishing a bond of his own or by demonstrating at an *immediate* post-possession adversary hearing that the repossession was unjustified; and (5) if such a hearing were the method to gain repossession, the debtor could secure compensation for economic and reputational damages, and the payment by the creditor of the debtor's attorney's fees. These procedures were carefully tailored to protect both the debtor and the creditor, and minimized the possibilities of an erroneous deprivation of the debtor's right to possession of the goods purchased.

The procedural due process requirements of notice and an opportunity to be heard prior to a deprivation of property is not limited to provisional remedies like those found in *Fuentes, North Georgia Finishing, Inc.*, and *Mitchell*. This Court has found statutory procedures for post-deprivation hearings to be inadequate in a variety of cases. *E.g.*, *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978) (public utility termination of electrical power for nonpayment of disputed bills); *Perry v. Sindermann*, 408 U.S. 593 (1972) (firing from employment at state university); *Morrissey v. Brewer*, 408 U.S. at 484-87 (termination of parole); *Stanley v. Illinois*, 405 U.S. 645 (1972) (involving unwed father's custody over children); *Bell v. Burson*, 402 U.S. 535 (1971) (suspending driver's license); *Goldberg v. Kelly*, 397 U.S. at 269, 271 (withholding welfare benefits); *Barry v. Barchi*, 443 U.S. 55 (1979) (racehorse trainer license suspension procedures); *Goss v. Lopez*, 419 U.S. 565 (1975) (requiring informal hearings before high school students can be suspended). While in the aforementioned cases it cannot be said that there was a seizure in the sense that property was taken by force by a state actor, in

each of those cases there was deprivation of a constitutionally protected property or liberty interest.

The procedures of MPPAA are no different than the summary replevin procedures in *Fuentes*, the pre-judgment garnishment procedures in *North Georgia Finishing, Inc.*, or the pre-judgment sequestration procedures in *Mitchell*. Under MPPAA, major assets of G & R are stripped from its possession and used to satisfy a sharply disputed claim prior to a cursory review of the merits of that claim. Under MPPAA, it is the irresistible pressure upon an employer to pay in monthly installments in order to avoid acceleration, liquidated damages, interest and attorney's fees which replaces the sheriff or marshal. This difference lacks practical significance, and the Court has never chosen to elevate form over substance.[3]

MPPAA does not attempt to satisfy the requirements of *Fuentes* to validate the pre-hearing taking of G & R's property. There is no important governmental or general public interest present to justify the requirement that G & R commence making withdrawal liability payments prior to a hearing on the merits. There are only competing private interests -- G & R's interest in retaining possession of its assets, and CPT's interest in obtaining withdrawal liability payments. In view of the devastating impact the payment of withdrawal liability will have on the company's continued operations, G & R's interest in preserving its assets and cash flow is compelling.[4]

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[3] The legislative history reveals that requiring withdrawn employers to make withdrawal liability payments prior to a hearing on the merits was intended only to secure to CPT an uninterrupted flow of contributions. *Senate Labor Committee Summary and Analysis of Consideration of S. 1076 (April 1980)*, reprinted in BNA Pension Reporter Special Supplement at 84 (September 29, 1980). Congress was thereby attempting to shield CPT from the ordinary costs and inconvenience of litigation; an insufficient reason for ignoring rudimentary due process standards. *Fuentes*, 407 U.S. at 90 n. 22.

[4] Congress did not consider CPT's interest in uninterrupted contributions from withdrawing employers to be compelling. Section 502(g) MPPAA § 1132(g) (Supp. V 1981), provides a new jurisdictional basis for the recovery of delinquent fringe benefit contributions from employers. *American Benefit Plan Administrators, Inc. v. Foley*, 2 E.B.C. (BNA) 1897 (C.D. Cal. September 9, 1981). MPPAA § 502(g), however, does not require that employers faced with conclusory allegations that they are delinquent in their fringe benefit contributions in a specified amount commence contribution payments prior to a trial on the merits of the claim.

The facts presented in this case demonstrate that there is no special need for CPT to commence immediate collection of withdrawal liability prior to a hearing on the merits of its claim. No claim is raised that G & R is presently or potentially insolvent.

MPPAA does not satisfy the final *Fuentes* requirement. No judicial officer decides, under the standards of a narrowly drawn statute, whether a pre-hearing deprivation is justified. There is no requirement that CPT appear before any judicial officer in order to obtain withdrawal liability payments. Procedural due process in this area requires that a judge or judicial officer participate in any deprivation of property and the judge or judicial officer must have the discretion to deny the claim. *Johnson v. American Credit Co.*, 581 F.2d 526, 534 & n. 16 (5th Cir. 1978); *United States General, Inc. v. Arndt*, 417 F.Supp. 1300, 1312 (E.D. Wis. 1976).

4. MPPAA deprives G & R of its right to trial by jury under the seventh amendment.

The right to a trial by jury is one of the most cherished and enduring of the fundamental individual rights. *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 419-20 (9th cir. 1979), *cert. denied*, 446 U.S. 924 (1980). The right to a trial by jury, whether guaranteed by the constitution or by statute, must be "jealously guarded by the courts." *Jacob v. United States*, 315 U.S. 752, 752-53 (1942); *In re Financial Securities Litigation*, 609 F.2d at 421.

The seventh amendment guarantee of a trial by jury applies fully to statutory rights unless the action is considered to be a "public" right or if the issue to be tried is not legal in nature. *Curtis v. Loether*, 415 U.S. 189, 194-95 (1974); *Parsons v. Bedford*, 28 U.S. [3 Pet.] 433, 446-47 (1830). Where the issue to be tried does not involve a pubic right and is in the nature of one cognizable in common law courts, "the aid of juries is not only deemed appropriate but is required by the Constitution itself." *Crowell v. Benson*, 285 U.S. 22, 51 (1932). MPPAA does not create a true "public right." The relief sought by CPT is definitely legal in nature.

The scope and breadth of the public rights exception was recently explicated by this Court in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, ___ U.S. ___, 102 S.Ct. 2858, 2869-74 (1982) (plurality opinion), in declaring the Bankruptcy Reform Act of 1978 unconstitutional because bankruptcy court judges do not have the attributes of life tenure and the protection against salary diminution specified in Article III of the Constitution. Making express reference to its prior decision in *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), this Court found from an examination of its prior precedents that "at a minimum" the controversy must be between the "government and others" in order for the action to involve a public right. Conversely, a private right is the liability of "one individual to another under law as defined." 102 S.Ct. at 2870-71 & n. 23 (plurality opinion).

Atlas Roofing Co., Inc. and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), aptly illustrate the application of the public rights doctrine. In both cases, an agency of the United States was a party. In *Jones & Laughlin Steel Corp.*, it was the litigating arm of the National Labor Relations Board. In *Atlas Roofing Co., Inc.* penalties were assessed by the Secretary of Labor and enforced through proceedings before the Occupational Safety and Health Review Commission. 430 U.S. at 445-47. In contrast, the enforcement of withdrawal liability obligations is placed in the hands of a private party, CPT. The public rights doctrine is thus inapplicable to withdrawal liability actions.

Once it is determined that adjudications of a statutory claim do not involve "public" rights, the constitutional entitlement to a jury trial turns on whether the issue to be tried is legal or equitable in nature. To resolve this question, the Court must examine the historical dichotomy between law and equity, the remedies sought, and the practical limitations of juries. *Ross v. Bernard*, 396 U.S. 531, 538 n. 10 (1970).

There can be no question that the relief sought by CPT is legal in nature. The issue to be tried is whether CPT is entitled to a money judgment against withdrawn employers to enforce its withdrawal liability assessment. "Where an action is simply for the recovery and possession of specific real or personal property, or *for the recovery of a money judgment*, the action is one at law." *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891) (emphasis added). It is apparent from the nature of the duty imposed by MPPAA that CPT is essentially seeking damages allegedly

suffered by CPT from G & R's withdrawal. *See* 126 Cong. Rec. S10103 (daily ed. July 29, 1980) (statements by Sen. Dole).

There is a direct analogy between CPT's efforts to collect withdrawal liability payments and the common law action for breach of contract or the common law count of assumpsit. CPT claims that payment of withdrawal liability is necessary to fulfill employee expectations under trust agreements. It has long been recognized that trust fund contributions are in the nature of compensation to employees. *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). CPT's action to collect withdrawal liability payments in order to purportedly fulfill the promise of a pension made to employees is no different from the situation in which an employer and an employee directly enter into a written employment agreement providing that upon completion of a certain number of years of employment, the employee will be entitled to a pension. If the employer fails to fulfill its promise to the employee, the employee, at common law, could bring an action for breach of contract or assumpsit. *Bird v. Connecticut Power Company*, 144 Conn. 456, 133 A.2d 894 (1957). *Cf. Weber v. Bell Telephone Company of Pennsylvania*, 415 Pa. 292, 203 A.2d 554 (1964) (action to recover pension sounds in assumpsit, ousting court of equity of jurisdiction); *Perrault v. Hall*, 94 N.H. 191, 49 A.2d 812, 813 (1946) (an employee's action to recover a pension in accordance with a written agreement was found to be an action in special assumpsit). Actions in assumpsit at common law were tried by a jury. *See* 3 W. Blackstone, *Commentaries on the Laws of England*, 153-155 (Legal Classics Library ed. 1983).

Actions have been brought successfully against employers for relief akin to withdrawal liability on a breach of contract theory. *See Murphy v. Heppenstall Co.*, 635 F.2d 233 (3rd Cir. 1980), *cert. denied*, ____ U.S. ____, 102 S.Ct. 999 (1982) (the court authorized a "contract-based" action by retired employees to recover directly from an employer the difference between the amount of pension payments guaranteed by the PBGC and the amount of pension payments set forth in a pension agreement); *United Steelworkers of America v. Crane Co.*, 605 F.2d 714, 719-21 (3rd Cir. 1979) (successful action under Section 301 to compel continued funding of past service liability subsequent to pension plan termination where the court recognized that the action was "most like an action at law").

Consideration of withdrawal liability claims is not beyond the practical abilities and limitations of juries. Juries routinely hear and decide cases

as complex, or more complex, than the types of cases under MPPAA. *See, e.g., In re Financial Securities Litigation*, 609 F.2d at 429-31.

5. MPPAA denies G & R access to an Article III court.

In committing the resolution of disputes concerning withdrawal liability to arbitration, MPPAA denies G & R access to a trial before an Article III judge, under this Court's decision in *Northern Pipeline Construction Co.* U.S. Const. art. III, § 1, provides that the judicial power shall be vested in this Court, "and in such inferior courts as the Congress may from time to time ordain and establish." Justices of this Court and judges of the inferior courts hold their office for life tenure and are protected against salary diminution during their term. U.S. Const. art. III, § 2, cl. 1, guarantees that judicial power shall extend to all cases arising under the constitution or the laws of the United States.

Only in three narrow situations is Congress exempt from the command that judicial power be exercised by Article III courts. These exceptions, none of which applies here, pertain to territorial courts, courts martial, and specialized legislative courts adjudicating "public rights." *Northern Pipeline Construction Co.*, 102 S.Ct. at 2867-69. The only exception conceivably applicable to the present case is that dealing with the adjudication of "public rights."

As the court in *Northern Pipeline Construction Co.* stated, "private-rights disputes . . . lie at the core of the historically recognized judicial power." 102 S.Ct. 2871. Withdrawal liability disputes do not involve public rights. The questions presented concern the liability of one individual to another under the law as defined. *Id.* at 2870-71. Arbitrators under MPPAA do not enjoy life tenure and are not protected against salary diminution. Congress has improperly diverted the adjudication of withdrawal liability claims to a non-judicial arbitration scheme.

6. Application of MPPAA to G & R constitutes a taking of G & R's property without just compensation.

The fifth amendment proscribes the taking of private property for public use without the payment of just compensation. The purpose of the taking clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960). The regulation of interstate commerce by Congress is subject to this constitutional limitation. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 & n. 19 (1935); *cf. U.S. v. Security Industrial Bank*, ____ U.S. ____, 51 U.S.L.W. 4007, 4008 (1982) (exercise of bankruptcy power under U.S. Const. art. I, § 8, cl. 4, is subject to the fifth amendment's prohibition against the taking of private property without just compensation).

The existence of a "taking" does not turn upon any set rules or formula but rather depends upon the facts and circumstances of each case. *Penn. Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 (1979). Nonacquisitive governmental action may constitute a taking, *U.S. v. Causby*, 328 U.S. 256 (1946), and "governmental regulation [may] be so onerous as to constitute a taking which requires compensation." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

In cases involving a "taking" challenge to a regulatory statute, the impact of the regulation on the claimant and the extent of its interference with "investment-backed expectations" are central considerations. *Kaiser Aetna*, 444 U.S. at 175; *Penn. Central*, 438 U.S. at 124; *Goldblatt*, 369 U.S. at 594. If the statute has a truly confiscatory effect on the claimant by depriving him of nearly all of his interest in the property or by rendering it worthless or useless to him, a *de facto* taking will be implied. *Cf. Armstrong v. U.S.*, 364 U.S. at 46-48 ("complete destruction" of materialmen's lien); *Pennsylvania Coal Co.*, 260 U.S. at 414-15 (nearly same effect as to complete destruction of mining rights).

The withdrawal liability provisions of MPPAA effect a drastic "taking" of G & R's property. The statute emasculates the contractual limitations of liability upon which G & R relied in its agreement to

participate in CPT, and in reaching its decision to cease that participation. G & R's rights have been "taken" just as surely as the contract rights of the materialmen were taken in *Armstrong v. U.S.*, 364 U.S. at 46-48, the rights of mortgagors were taken in *Louisville Joint Stock Land Bank*, and the rights of non-possessory, non-purchase money security interest holders would have been taken in *Security Industrial Bank*, 50 U.S.L.W. at 4008-09, 4010-11 (Blackmun, J., concurring in the judgment), had not this Court construed the Bankruptcy Reform Act of 1978 to apply prospectively.

Prior to the enactment of ERISA, limitations of liability clauses presented an absolute bar to the recovery of additional contributions beyond those required to be made under collective bargaining agreements even if a pension plan terminated with insufficient assets to fund pensions earned. *United Steelworkers of America v. Crane Co.*, 605 F.2d at 717-19. *See also Nachman v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 382 & n. 33 (1980). After the passage of ERISA, limitations of liability clauses still protected employers from additional funding obligations upon withdrawal except where PBGC had to guarantee benefits within five years of the withdrawal. *See Nachman*, 446 U.S. at 385 & n. 37; *Murphy v. Heppenstall Co.*, 635 F.2d at 237-39.[3] MPPAA obliterates these contractual protections, exposing withdrawn employers to immediate disabling liability far in excess of the burdens assumed when the employers entered into collective bargaining agreements.

The present case is strikingly similar to the leading authority of *Pennsylvania Coal Co. v. Mahon*. That case holds that a state statute which substantially furthers an important governmental interest may nevertheless so frustrate a plaintiff's distinct investment-backed expectations as to amount to a "taking." In *Pennsylvania Coal*, the claimant had sold the surface rights to particular parcels of property, but had reserved the right to remove the coal underneath. A Pennsylvania statute was enacted after the transaction which forbade any mining of coal that caused the subsidence of any house unless the house was the property of the owners of the underlying coal.

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[3] This Court has yet to resolve the questions as to ERISA's constitutionality. *See Nachman*, 446 U.S. at 368.

Clearly, this statute had a general public purpose, as does MPPAA. It prevented the subsidence of houses of neighbors and landowners. However, since the statute made it commercially impracticable to mine coal, it effectively destroyed the rights that the claimant had reserved in its contracts with the owners of the property. 260 U.S. at 414-15. This Court held that the statute had effected a "taking" of plaintiff's property without just compensation.

All the factors that the Supreme Court found significant in *Pennsylvania Coal* are present in the instant case. First, the plaintiff has properly asserted a property interest in the limitations of liability clauses of the trust and collective bargaining agreements. *Lynch v. U.S.*, 292 U.S. 571, 579 (1934). MPPAA actually permits confiscation of G & R's assets by imposing withdrawal liability which constitutes forty per cent of its net worth.

Second, MPPAA completely frustrates the plaintiff's investment-backed expectations as to its obligations under the collective bargaining agreement. G & R was obligated to contribute to the plan only until the expiration of the underlying collective bargaining agreement. G & R's liability was strictly confined to the hourly contributions required in the agreements, and G & R relied upon those calculated hourly obligations in formulating its bids to obtain construction contracts. G & R could not retroactively raise its prices for completed work, or for work under contract. MPPAA withdrawal liability invaded those same closed transactions with its new and devastating retroactive liabilities.

Third, the statute in *Pennsylvania Coal* effectuated a complete destruction of property rights. In the present case, MPPAA totally abrogates G & R's contract rights, fastening a novel obligation to contribute to the pension plan after the termination date of its collective bargaining agreement and in amounts far in excess of the contributions specified in that agreement. The key elements enunciated in *Pennsylvania Coal* are all present here. Application of MPPAA to G & R constitutes a taking of G & R's property without just compensation.

CONCLUSION

Compelling reasons support cross-petitioner's request for review. Granting certiorari will provide this Court with a unique opportunity to address and determine the numerous grounds of constitutional attack upon the withdrawal liability provisions of MPPAA. The dubious validity of that statute has enmeshed countless trust funds and employers in costly litigation, and it has imperiled crucial interests of labor unions and employees. The economic effects of this unprecedented legislation are ruinous and widespread. It will serve vital public interests and permit a full measure of justice to the parties if the cross-petition is granted.

The legal issues raised herein are of signal importance, and the case record renders present consideration of those issues appropriate. The fundamental facts necessary to a full adjudication have been stipulated, and the full span of issues has been raised, argued fully, and preserved throughout the litigation.

Wherefore, it is respectfully requested that this Court grant this cross-petition for certiorari.

Respectfully submitted,

MERRILL AND SCHULTZ,
A Law Corporation

By: Michael E. Merrill
Mark T. Bennett